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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 686

B. KATHRYN WILLIS, as EXECUTRIX OF
GEORGE S. WILLIS, DECEASED,
Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR DEFENDANT-RESPONDENT IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI

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The Circuit Court of Appeals decision is now reported at 122 F. (2d) 248.

The fact situation out of which this cause arose is succinctly stated by the Circuit Court of Appeals as follows:

"The story of the accident as told by the plaintiff's witnesses is briefly as follows: Willis and his fellow workers, Donofrio and Myers, were at work repairing switch 14 on the westerly side of the Enola classification yard. There was a long standing custom, with which all the employees were familiar, for switching to be continued while track repair work was being performed, and for the repair gang to protect themselves by having one of their number act as lookout and give warning of approaching cars. As cars are cut off at the Hump they roll down by gravity, attaining a speed of from six to ten miles per hour, and are directed to the proper track by the operation of switches manipulated from the Hump office. The car which hit Willis had to pass switch 14 to get on track 15, for which

it was destined. The switch was so set that cars could be sent to tracks 15, 16 and 17 but not to track 14. At the time of the accident Donofrio and Myers were at work on the switch and Willis was standing watch, as had previously been arranged between the three. No warning was given by Willis of the approach of the car which hit him. Myers happened to catch a glimpse of it over his shoulder when it was five or ten feet distant and jumped out of the way. The other two were hit, with the result that Willis was killed and Donofrio seriously injured'' (R. pp. 274-5).

POINTS

I. The decision below was in no wise based upon the assumption of risk rule, therefore there is no basis for the contention that certiorari should be granted upon the ground that this cause involves the construction of the recent assumption of risk amendment to the Federal Employers' Liability Act.

The decision of the Circuit Court of Appeals and the ruling of Judge Byers in the Trial Court were both upon the ground that the plaintiff had failed to establish negligence on the part of the defendant, not upon the ground that although there was negligence of the defendant, Willis had assumed the risk. Judge Frank's dissenting opinion shows that he also did not consider that the question of assumption of risk was involved. There was no suggestion in either court that plaintiff should be denied recovery on the ground that Willis had assumed the risk of negligence on defendant's part. Indeed, as defendant's brief in the Circuit Court of Appeals shows, defendant made no such contention.

There is, therefore, no basis for seeking certiorari upon the ground that this cause involves construction of the assumption of risk amendment.

II. There is no basis for asking this Court to review the decision of the two lower courts that there was no evidence sufficient to make a jury issue as to defendant's negligence.

Plaintiff's claim of negligence is that defendant should not have permitted work to go forward on switch 14, without blocking the track leading to that switch (Petition, 2; Brief, 15). It is not clear whether or not plaintiff claims that this method was negligent even though proper provision for warning was made. Plaintiff's argument, in any event, is directed principally to the contention that no provision for warning was made.

There was no testimony that failure to block the track alone (*i. e.*, apart from the question of warning), made the work unnecessarily dangerous, and both the Circuit Court of Appeals and Judge Byers ruled that this method of work was not negligent where provision was made for warning (R. 276; 256).

Neither *Banchetti* v. *Gorsline & Swan Const. Co.*, 152 App. Div. 275, nor *Nowak* v. *Delaney Forge & Iron Co.*, 159 App. Div. 155, supports plaintiff's contention that the jury could find the method of doing the work dangerous and reckless, even without any testimony to that effect (Brief, 21). In the *Banchetti* case, men standing on a narrow scaffolding high in the air, were struck when a draft was moved without warning by a derrick they could not see, and in the *Nowak* case, the winch operator could not see his fellow workmen nor they him and there was no lookout. Willis was in an open yard with ample view and nothing else to do but watch in one direction, in the daytime.

On the question of lookout, the testimony of the two witnesses to the accident was uncontradicted that Willis was acting as lookout, and both courts so found (R. 275; 256).

Judge Frank, however, thought that notwithstanding that the jury never saw the witnesses, their testimony having been taken by deposition, the jury were "entitled to reject this uncontradicted evidence" (R. 277), because the witnesses were defendant's employees and might have an interest in clearing their employer or themselves of blame (R. 278). This remarkable conclusion was not rested on any supporting decision.

Although Judge Frank said he was "not aware of any decisions to the contrary" (R. 279), *Hauss* v. *Lake Erie etc. Co.*, 105 Fed. 733, 736, held that the fact that a witness was an employee was not enough to justify rejection of his testimony. Of the other cases cited by Judge Frank as furnishing "some support" for his view, *Craft* v. *Northern Pacific R. Co.*, 62 Fed. 735, went on the ground of the witness's demeanor and other impeaching circumstances, and an Oregon code provision giving the jury unusual latitude in rejecting testimony; and in *Robinson* v. *New York Central, etc. Co.*, 9 Fed. 877, although the witnesses testified that the boiler was sound, the Court considered that the test as detailed by them was not adequate to establish whether the boiler was sound. The consequences of a rule of law such as Judge Frank suggests would be in effect to brand all employee witnesses as perjurers, as a matter of law.

Decisions of this Court to the contrary are *C. & R. Ry. Co.* v. *Martin*, 283 U. S. 209, 216, and *P. R. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343.

Plaintiff's brief makes little attempt to justify the view expressed by Judge Frank but rather attempts to show that there were contradictions in the testimony,—contrary to the view of all of the Judges, both Trial and Appellate.

The alleged contradictions disappear upon analysis. As to Myers, it is clear that his statement that no one had been appointed to watch, referred to no one outside the gang. He had just testified to plaintiff's counsel that no one outside the gang acted as watchman, but that, of the gang, Willis was acting as watchman (R. 114). In testifying that the men did not talk "about how the work was to be done with respect to watching", Myers was referring to the method of watching. As to Willis's appointment to watch, he testified:

"George [Willis] said he was not feeling so good. Tommy and I both said, 'Well, George, you watch. Tommy and I will do the work.' That is just the words we said" (R. 135).

Since the witnesses testified that sometimes one stood watch and sometimes another, no contradiction was involved in Donofrio's testimony (Brief, 18) that on a switch job two days previous Myers watched and Willis worked (R. 81).

The fact that Willis was a signal maintainer and may have been more highly paid than the other men (Brief, 18), is in no wise contradictory of testimony that he sometimes acted as a watchman and that, not feeling well, the gang had arranged that he do so on the day of the accident.

The fact that Myers and Donofrio did not know just what Willis was doing at the moment of the accident or for a few minutes before, is not contradictory of the testimony

that Willis was acting as watchman, but rather is confirmatory of the fact that Myers and Donofrio were giving their whole attention to the switch in reliance upon Willis' acting as lookout to protect them.

The fact that Willis was in a place where he could be struck shows not that he had not undertaken the job of watching but that he was negligent in performing his duty to watch.

This is an appropriate case for this Court to apply the rule laid down in *Boehmer* v. *P. R. R. Co.*, 252 U. S. 496:

"* * * we accept the concurrent judgment of the lower courts that the carrier was not negligent."

"* * * where two courts have agreed [directed verdict for the defendant], we will not enter upon a minute analysis of the evidence. *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222."

Certiorari is not granted "to review evidence and discuss specific facts". *United States* v. *Johnston*, 268 U. S. 220, 227; *Crowell* v. *Benson*, 285 U. S. 22, 65; *Houston Oil Company* v. *Goodrich*, 245 U. S. 440, 441; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178.

III. No error was committed in the Trial Court granting, in the alternative, a new trial.

It was not only proper, but the duty of the Court, to pass upon the alternative motion. *Montgomery, Ward & Co.* v. *Duncan*, 311 U. S. 243. In so far as plaintiff argues that this procedure is "illogical" and that there is inconsistency between the two forms of relief granted, plaintiff is in effect asking for a reconsideration of the *Montgomery, Ward & Co.* decision.

The propriety of the first branch of the relief granted (dismissal of the complaint) is dealt with in the preceding point.

The propriety of the alternative relief (new trial) in no way turns on what argument, if any, upon that motion is made a part of the Record (Brief, 25). In any event, the granting of a new trial is not a proper matter for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

This case presents none of the recognized grounds for the granting of a writ. No question of construction of a statute is involved, nor is the decision at variance with decisions of this Court or the courts in other circuits. No question of law or of public importance is involved. What is sought is merely that this Court review the evidence for the purpose of deciding whether the two courts who found it insufficient after painstaking analysis, were incorrect.

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New York, N. Y., October 28, 1941.